In the Supreme Court of the United States

OCTOBER TERM, 1924

ROBERT F. MITCHELL, GEORGE H. MITCHELL, Copartnership, Trading as R. F. and G. H. Mitchell, appellants
v.
THE UNITED STATES

No. 176

APPEAL FROM THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims dismissing the petition of plaintiffs-appellants upon findings of fact made after trial of the issues.

The United States acquired from claimants 440 acres of farm land with improvements thereon, paying therefor the sum of $76,000. This land is now part of the Aberdeen Ordnance Proving Grounds, Maryland, embracing about 35,000 acres. The proving grounds were established under the Act of October 6, 1917, c. 79, 40 Stat. 345, 352.

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Some time after accepting unconditionally the $76,000 as compensation for the physical properties claimants brought this action to recover $100,000 damages for the destruction of its canning business, carried on for many years prior to 1917 in connection with the farm which has been secured by the Government, as already described.

THE FACTS

The following facts have been determined by the Court of Claims:

On October 16, 1917, and long prior thereto, the claimants were the owners of a farm near Aberdeen, Harford County, Maryland, embracing about 440 acres. Located thereon was a canning plant operated by claimants for canning corn. This business consisted in growing and canning a particular grade of choice corn known as "Whole Grain Shoe Peg Corn."

This farm and other lands in that vicinity, as well as the climatical conditions, were especially adapted for the raising of this kind of corn.

The claimants used on an average of about 500 acres of corn in their canning operations and 200 acres thereof were used by them for growing this corn, the remainder being grown under contract with neighboring farmers. (First Finding, p. 6.)

The Deficiency Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 352, contained the following provision:

> PROVING GROUND: For increasing facilities for the proof and test of ordnance ma-

terial, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000: *Provided*, That if the land and appurtenances and improvements attached thereto, as contemplated under the foregoing appropriation, can not be procured by purchase, then the President is hereby authorized and empowered to take over for the United States the immediate possession and title, including all easements, rights of way, riparian and other rights appurtenant thereto, or any land selected by him to be used for the carrying out of the purpose named in the aforesaid appropriation. That if said land and appurtenances and improvements shall be taken over as aforesaid the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. Upon the taking over of said property

by the President as aforesaid the title to all such property so taken over shall immediately vest in the United States: *Provided further*, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to the expenditures authorized hereunder.

The President, by proclamation of October 16, 1917 (40 Stat. 1707), declared certain lands in Harford County, Maryland, embracing about 35,000 acres, to be necessary for the proving grounds. The farm of about 440 acres and improvements thereon owned at that time by claimants were included in that area.

The Government having been unable to secure by negotiation the purchase of the lands, the President, on December 14, 1917 (40 Stat. 1731), issued a proclamation taking over the lands designated in the proclamation of October 16, 1917, for the purposes noted. (Second Finding, p. 6.)

In September, 1917, prior to the passage of the act, an officer of the War Department visited Harford County, Maryland, and at one or more public meetings, held in the vicinity of the proving grounds, stated that the Ordnance Department had recommended to Congress that persons from whom land was obtained therefor should be compensated, not only for the land taken, but also for all injuries and losses sustained by them as a result of the establishment there of the proving grounds, and that this principle of compensation would govern in the event the Government project should be established there. (Finding 3, pp. 6–7.)

A number of citizens, whose property and business would be affected by this project, called on the Secretary of War both before and after the passage of the Act of October 6, 1917, the latter assuring them that compensation for property taken and for losses sustained by reason thereof would be made on the most liberal basis that the law would allow and justice to the Government permit. (Fourth Finding, p. 7.)

Following the taking of the lands, the President appointed a commission to determine the proper compensation to be paid to those whose lands were taken.

The commission determined that claimants were entitled to $76,000 for their farm and canning plant, and pursuant to this finding, that sum was paid by the Government to claimants, who accepted the same "without protest or rejection."

In arriving at the amount of compensation to be paid for these properties, the commission did not make any allowance for damage for claimants' loss of the business in which they were engaged prior to and at the time of the taking. (Fifth Finding, p. 7.)

Claimants' whole training and experience had been in the growing and canning of "Whole Grain Shoe Peg Corn." By the establishment of the proving grounds a very large part of the lands in that section of the country available for and especially adapted to the growing of "Shoe Peg Corn" was withdrawn from use for that purpose, and claimants were there-

after unable to reestablish themselves in their former business of growing and canning this kind of corn. (Sixth Finding, p. 7.)

During the five years next preceding the taking of claimants' property, their average annual net income from the property and business was approximately $6,000.

On the basis of six per cent income on $76,000 paid claimants for their property, they would have received an annual income of $4,560. Claimants have been engaged in other occupations since the taking, but it does not appear what have been their net earnings or incomes during this time. (Seventh Finding, p. 7.)

It does not satisfactorily appear whether or not claimants have, upon the whole, sustained any reduction or loss in net income or any other loss by reason of the taking of their property by the Government and the discontinuance of their business of the growing and canning of corn. (Eighth Finding, p. 8.)

The Court of Claims in dismissing the petition, rested its decision on two grounds. First, that the plaintiff, in accepting unconditionally the $76,000 fixed by the President as just compensation, precluded a recovery of any further sum for damages arising out of the taking of the land. Secondly, that the Government is not liable for damages due to the loss of claimants' business.

In a supplementary opinion, the Court of Claims further decided that the decision of this Court in *Houston Coal Company* v. *United States*, 262 U. S. 361, relative to the right of a claimant to recover further compensation under a statute worded similarly to that of the Act of October 6, 1917, *supra*, did not in any way conflict with its decision upon that point in the instant case, for the reason that there was no protest, notice of reservation, or intention signified to sue after the acceptance by the claimants of the award of $76,000, at the time it was paid to them by the Government.

THE QUESTIONS INVOLVED

1. Whether the claimants by accepting unconditionally the award of $76,000 are not thereby precluded from recovering any further sums as compensation for damages arising out of the taking of their land.

2. Whether the loss of a business, resulting from the taking of land by the Government, constitutes an element of damage for which United States must pay.

3. Whether Congress intended in using the phrase "damages and losses to persons, firms, and corporations, resulting from the procurement of land," in the Act of October 6, 1917, to give the right to recover damages which did not previously exist, and which are not legal damages within the meaning of "just compensation."

ARGUMENT

I

When the United States paid and the claimants unconditionally accepted the amount fixed by the President as just compensation for the property taken, the question of damages arising out of the original transaction became settled as an accord and satisfaction

The United States by Presidential Proclamations of October 16, 1917, and December 14, 1917, took possession and title to the lands now embraced within the proving grounds.

In order to determine just compensation to be paid the various owners of the property, the President, through the Secretary of War, appointed a commission. By the Proclamation of December 14, 1917 (40 Stat. 1731, 1733), all interested persons were notified to appear and present their claims for compensation to that Board. The commission then submitted tentative awards to the President. The latter then, pursuant to the terms of the Act mentioned, in each case, fixed the amount of just compensation to be paid. He fixed the amount of just compensation in this case at $76,000, and tendered the sum to claimants in settlement of their claim. They voluntarily accepted it without reservation or protest—unconditionally.

In the light of these facts it is apparent that all parties concerned intended that acceptance of the award of $76,000 should be a complete settlement of the claim of the appellants against the United

States for taking this property. It became a closed transaction. It was equivalent to a purchase by the United States at an agreed price. When the President, through his representatives, offered the claimants the sum of $76,000 and they accepted and received it without indicating that it was unsatisfactory, the transaction was the same as any other offer and acceptance. If the claimants did not so intend, it is reasonable to assume that they would have done something to preserve any rights which they believed they might have by indicating that the amount offered was unsatisfactory. The statute itself gave them a remedy if the offer was not satisfactory, and in the absence of any indication on their part that it was not satisfactory the acceptance must be regarded as conclusive evidence that it was satisfactory. In other words, the transaction amounted to a voluntary settlement.

The case of *Houston Coal Company* v. *United States*, 262 U. S. 361, is not an authority to the contrary. In that case, brought under section 10 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276), the plaintiff alleged that in accepting the price fixed by the President as just compensation for coal requisitioned the amount fixed was received under protest because of duress, and with express reservation of the right to demand more.

The District Court dismissed the petition for lack of jurisdiction, holding that the Act in question did not grant permission to sue the United States to

one who had received the amount determined by the President.

The case was brought to this Court by direct writ of error and involved merely the jurisdiction of the District Court to hear and determine the issues presented. In reversing the District Court and holding that that court had such jurisdiction, this Court, by Mr. Justice McReynolds, said (p. 365):

> Considering this purpose and the attending circumstances, we think section 10 should be so construed as to give the District Courts jurisdiction of those controversies which arise directly out of requisitions authorized by that section.

Nothing in that opinion can be construed as an authority to the effect that one who unconditionally and without protest or reservation accepted the amount tendered by the President had a right to recover by suit any further sum as compensation.

By unconditionally accepting the $76,000 from the United States, all matters arising out of the taking of the land presented by claimants and considered by the commission and the President have become voluntarily settled and the transaction is now foreclosed, which the statute plainly intended it should be in such cases. *N. Y., N. H. & H. R. R.* v. *United States*, 251 U. S. 123, 127; *Winslow* v. *Baltimore & Ohio R. R.*, 208 U. S. 59, 62; *St. Louis Hay Co.* v. *United States*, 191 U. S. 159; *Pacific R. R.* v. *United States*, 158 U. S. 118, 121, 122; *United States* v. *Garlingle*, 169 U. S. 316, 322; *Chicago, Milwaukee Ry.*

Co. v. *Clark*, 178 U. S. 353; *DeArnold* v. *United States*, 151 U. S. 483; *United States* v. *Child & Co.*, 12 Wall. 232; *Baker* v. *Nachtrieb*, 19 How. 126; *Macfarland* v. *Poulos*, 32 App. D. C. 558.

This rule of law has been followed by the Court of Claims since 1873: *Comstock* v. *United States*, 9 C. Cls. 141; *Hancox* v. *United States*, 8 C. Cls. 400, 401; *Martin* v. *United States*, 10 C. Cls. 176, 282; *Baldwin* v. *United States*, 16 C. Cls. 297, 304; *Henegan* v. *United States*, 17 C. Cls. 273, 285; *Belt* v. *United States*, 23 C. Cls. 317, 319; *White* v. *United States*, 28 C. Cls. 57, 64; *Brice* v. *United States*, 32 C. Cls. 23, 29; *St. Louis Hay & Grain Co.* v. *United States*, 37 C. Cls. 281, 291 (affirmed 191 U. S. 159), and by the courts of the several States: *Allen* v. *Colorado Central R. Co.*, 22 Colo. 238; *Central of Ga. R. Co.* v. *Bibb Brick Co.*, 99 S. E. 126; *Fitzgerald* v. *Chicago Ry. Co.*, 48 Kan. 537; *Brigham* v. *Holmes*, 14 Allen (Mass.) 184; *Clay Co.* v. *Howard*, 95 Neb. 389; *Anthony* v. *Granger*, 22 R. I. 359.

II

The United States in taking the claimants' land, together with improvements, did not appropriate the business conducted thereon by this partnership, and is under no obligation to pay therefor

It is well settled that when the United States exercises its right of Eminent Domain it must pay just compensation for property taken. It is equally well settled that it includes the value of the land taken and improvements thereon, but does not include damages for loss of business.

In *Bothwell* v. *United States*, 254 U. S. 231, this court held that where the Government in the construction of a dam flooded private land, destroying the owners' hay there stored, and forced him to remove and sell his cattle, there was no obligation on the part of the United States to pay for the destruction of the business. There, the claimants' business was that of raising cattle. In this connection, Mr. Justice McReynolds, at pages 232–233, said:

> Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require." *United States* v. *Cress*, 243 U. S. 316, 329. But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.

The Court of Claims upon the point now under consideration rested its decision on that case. We think that decision disposes of this case.

The fact that the business destroyed in the case at bar was that of conducting a canning factory,

whereas in the *Bothwell case* it was that of raising cattle, is immaterial. The principles involved are the same.

It has, in fact, become well settled that when land occupied for business purposes is taken by Eminent Domain, anticipated profits from the continued carrying on of the business (which in the case at bar the claimants are seeking to recover) in its established location can not be considered in estimating the damages. *Brackett* v. *Com.*, 223 Mass. 119; *Pause* v. *Atlanta*, 98 Ga. 92; *Becker* v. *Philadelphia, etc. R. Co.*, 177 Pa. St. 252; *Hamilton* v. *Pittsburgh, etc., R. Co.*, 190 Pa. St. 51; *Philadelphia Ball Club* v. *Philadelphia*, 192 Pa. St. 632; *Cox* v. *Philadelphia, etc., R. Co.*, 215 Pa. St. 506; *Hunter* v. *Chesapeake, etc., R. Co.*, 107 Va. 158; *Bales* v. *Wichita Midland Valley R. Co.*, 92 Kan. 771; *Gauley, etc., R. Co.* v. *Conley* (W. Va.), 100 S. E. 290. See also *Laflin* v. *Chicago W. & N. R. Co.*, 33 Fed. Rep. 415, 421. In this connection Lewis on Eminent Domain (3rd Ed.), Section 727 (pp. 1271–1273) says:

> While it is proper to show how the property is used, it is incompetent to go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the Constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and where a part is taken it is the value

> of the part taken and damages to the remainder by the taking and use of the part of the purpose proposed. The business conducted upon the property is not taken and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business which may result from a removal or change consequent upon the taking must be borne by the owner for the sake of the general good in which he participates.

It is submitted that the Fifth Amendment does not guarantee to an owner whose land is taken by the Government any damages for the loss of his business by reason of the appropriation. As said by this Court in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326:

> And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in the Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the just "compensation" is to be a full equivalent for the property taken.

In *Sawyer* v. *Commonwealth*, 182 Mass. 245, it appeared that certain property was taken in the exercise of the power of eminent domain, and damages were claimed for injuries resulting to an established business said to have been caused by the loss of

patronage as the direct result of the appropriation of the property involved. In rejecting this claim, the court, in an opinion by Mr. Justice Holmes (then Chief Justice of the Supreme Judicial Court of Massachusetts), at page 247, said:

> It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. See *Smith* v. *Boston*, 7 Cush. 254; *Stanwood* v. *Malden*, 157 Mass. 17. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as

it may have enhanced the value of the land See *New York, New Haven, & Hartford Railroad* v. *Blacker*, 178 Mass. 386, 390.

This is now a leading case on the subject. See 10 R. C. L., Section 127 (p. 145).

III

The act of October 6, 1917, provides for the payment of nothing more than just compensation for any property taken under the statute

It is to be noticed that Congress provided for the acquisition of this proving ground in a deficiency appropriation act. This is important, because it is customary for Congress in making appropriations carefully to identify the purpose for which it is made. This because officers charged with its administration must apply the fund appropriated only to the purposes therein specified. So in the present case Congress, in making the appropriation, used this language:

> PROVING GROUND: For increasing facilities for the proof and test of ordnance material, including necessary buildings, construction, equipment, land, and damages and losses to persons, firms, and corporations, resulting from the procurement of the land for this purpose, and also the salaries and expenses of any agents appointed to assist in the procurement of said land or damages resulting from its taking, $7,000,000.

The language just quoted is nothing more than a general statement made to identify the appropriation.

But the portion of the Act which authorizes the taking of the property expressly provides that "just compensation" shall be paid to the owners. It reads:

> That if said land and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President.

Again, the term "just compensation" is used in the Act in providing for the method to be followed by owners in the event they are not satisfied with the award made by the President. In this respect the Act reads:

> * * * and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum, as, added to the seventy-five per centum, will make up such amount as will be just compensation therefor.

It will be observed, therefore, that after identifying the general purposes of the appropriation, Congress, in providing what shall be paid to the persons whose property is taken, has expressly said that they are to receive "just compensation" only. Indeed, if they sue for further compensation than that allowed by the President, under the express terms of the Act they can only receive "just compensation." The

term "just compensation" is used in its Constitutional sense and as construed by the courts it does not include damages for the loss of a business resulting from the taking of land.

It is interesting to note that a somewhat similar statute was interpreted by the New York Court of Claims in *Waterloo Woolen Mfg. Co.* v. *State of New York*, 118 Misc. 516. There, the statute read, in part, as follows:

> * * * for compensation for lands appropriated as provided in section 4 of said Act (ch. 147, Laws of 1903, as am'd), or damages caused by the work of improvement hereby authorized.

It was contended that in using the language just quoted the legislature had assumed liability for all damages resulting from the improvement thereby authorized. The court in disposing of this question, at page 520, says:

> I do not think the statute discloses any such intention. It is merely a provision appropriating money, which makes available the profits of the bond issue for the specified uses including such awards against the state as might be made by the Court of Claims for compensation or damages or both according to the existing principles of law properly applicable to the claims on which the awards might be made.
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> This statute discloses no intention to assume new and unprecedented liabilities and its distortion to include any such an intention would be unwarranted. (P. 521.)

So in the statute involved in the case at bar, Congress intended to provide for the payment of *legal* damages which come within the term "just compensation."

It is fair to say that if Congress had intended that damages should be paid for the loss of business, they would have said so in so many words, as in *Earle* v. *Commonwealth*, 180 Mass. 579. In that case the statute read:

> In case any individual or firm owning * * * an established business on land in the town of West Boylston, whether same shall be taken or not under this Act, or the heirs or personal representatives of such individual or firm, shall deem that such business is decreased in value by the carrying out of this Act, whether by loss of custom or otherwise, and unable to agree with said board as to the amount of damages to be paid for such injury, such damages shall be determined and paid in the manner hereinbefore provided.

CONCLUSION

It is submitted that the judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
RANDOLPH S. COLLINS,
Attorney.

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